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No. 85-920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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REPLY BRIEF FOR PETITIONERS

Respondents' defense of the holding below—that the legislative veto provision of Section 43 of the Airline Deregulation Act ("Deregulation Act") is severable from the remaining provisions of that same section—further demonstrates the court of appeals' radical departure from the severability standard set forth in *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932). Respondents mischaracterize petitioners' position and resort to mechanical formulas and presumptions to avoid a searching analysis of whether Congress would have enacted the remaining provisions of Section 43 in the form it did had it known the legislative veto was invalid. In so doing, respondents, like the appellate court, would have this Court usurp legislative prerogatives by reconstructing Section 43 and delegating to the Department of Labor ("DOL") greater regulatory power than Congress ever intended. Since the legislative veto was the cornerstone of the congressional-executive partnership

created by Section 43(f) to develop a single Employee Protection Program ("EPP"), however, the remaining provisions of the same section cannot be preserved without violating congressional intent.

I. THE SEVERABILITY TEST ESTABLISHED BY THE COURT OF APPEALS RADICALLY DEPARTS FROM THE *CHAMPLIN* STANDARD.

Respondents attempt to blur the distinction between this Court's severability standard, which was applied by the district court below, and the new standard articulated by the court of appeals. Although the district court found Section 43 severable from the remainder of the Deregulation Act, it held that the "legislative veto provision of § 43 is inextricably bound to the remainder of *that section*, and that Congress would not have enacted the *remainder of § 43* in its absence." *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 96 (D.D.C. 1984) (37a), *rev'd*, 766 F.2d 1550 (D.C. Cir. 1985) (emphasis added). Following the *Champlin* test, the district court sought to determine whether Congress would have enacted *those provisions* which are within its power, independently of that which is not. It did not ask "whether Congress would have enacted *some* type of employee protection plan in the absence of a legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute." *Id.* at 94 n.3 (33a n.3) (emphasis in original). The district court recognized that "[t]he task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself." *Id.*

Respondent Secretary of Labor contends that the appellate court "faithfully applied" the rule prescribed by this Court, DOL Br. at 12, yet concedes that the court of appeals asked not whether Congress would have enacted the remaining provisions of Section 43 if it had known the veto was invalid, but whether "Congress would have preferred no airline employee protection provision at all

to the existing provision *sans* the veto provision." *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1561 (D.C. Cir. 1985) (19a). The court of appeals' test thus requires severance whenever a court decides that Congress thought the purpose or subject matter of the statutory section was important, *id.*, obviating the need for a searching inquiry into whether Congress would have been satisfied with how the remaining provisions achieve the statutory objective. In applying its novel standard, the court below consistently rejected as irrelevant evidence of such congressional intent in the statute's language, structure, and legislative history. *See id.* at 1560, 1561, 1563, 1564, and 1565 (18a, 19a, 25a, 26a, and 28a). Respondents argue that if Congress is not satisfied with a court's reconstruction of Section 43, it can modify it later. DOL Br. at 19. But this Court has consistently placed the responsibility for reconstruction on Congress when it is evident that an invalid provision is an integral part of a statutory section.

A. Under The Guise Of *Champlin*, The Court Of Appeals Substituted A Strong Presumption Of Severability For A Careful Analysis Of Legislative Intent.

Unlike the statute addressed in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 932 (1983), the Deregulation Act expresses no congressional preference for severability. Nonetheless, respondents begin their analysis by claiming that even in the absence of a severability clause, this Court has established in *Champlin* and other severability cases a "strong presumption . . . in favor of severance." DOL Br. at 17. This simply is not the case. In *Champlin*, this Court held that if a portion of a statutory section was unconstitutional, the entire section must fall if "it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not." *Champlin*, 286 U.S. at 234. The key in this

and subsequent cases was thus whether the legislature would have been satisfied with what remained after severance.

Even though the explicit severability clause in the *Chadha* statute provided a presumption of severability, the Court there nevertheless carefully analyzed the legislative history to determine if there was sufficient evidence that Congress would have passed the remainder of the statute in the absence of the severed portion. Both *Champlin* and *Chadha* thus reaffirmed that severability depends on "whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." In the absence of an express congressional declaration, "the imposition of any unspecified burden of persuasion on either side [is not] beneficial to the inquiry." *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983) (footnote omitted).[1]

Respondents devise support for this "strong presumption" with references to unconnected phrases and disparate cases. First, respondent Secretary of Labor con-

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[1] *Chadha* and *Champlin* are completely consistent with the doctrine of severability as it has developed over the years. In *Warren v. Charlestown*, 2 Gray 84 (Mass. 1854), the Massachusetts Supreme Court case that is the genesis of severability analysis, Chief Justice Shaw declared that in order for an unconstitutional portion of a statute to be severable,

> "the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

2 Gray at 99.

tends that the "unless it is evident" phrase in *Champlin* creates a strong presumption of severability. Read in its entirety, the test in *Champlin* implies no presumption whatsoever:

> "The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

286 U.S. at 234. At most, the test merely disavows a presumption of *non*severability[2] and confirms that a court must examine legislative intent to determine whether Congress would have enacted the remaining parts of Section 43 without the legislative veto.

Respondents also misapply *Chadha's* language that an invalid provision "is *further* presumed severable if what remains after severance 'is fully operative as a law.'" 462 U.S. at 935 (quoting *Champlin*, 286 U.S. at 234) (emphasis added). Where Congress has expressly declared a provision severable, an invalid provision nonetheless can be severed only if what remains after severance is workable. *See* Pet. Br. at 22 n.24. Thus, the presumption created by the severability clause in *Chadha* was furthered by the operability of what remained. In the absence of an express congressional declaration, however, the majority of this Court has never found a presumption of severability merely because part of the section remaining after severance could still be made to function. In such circumstances, the courts must do what they always do—determine the legislative intent from the language, structure and history of the statute. Creating a

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[2] Prior to *Champlin*, the Court had held that in the absence of a severability clause, the invalid provision should be presumed nonseverable. *See Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42 (1929).

presumption based solely on operability could lead to absurd results the legislature never intended.[3]

Respondents further rely on *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), which quotes the rule articulated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), that "[t]he cardinal principle of statutory construction is to save and not to destroy." DOL Br. at 13.[4] Contending that the court of

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[3] In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), a case cited by respondent Secretary of Labor, DOL Br. at 19, Congress had enacted a legislative scheme designed to stabilize bituminous coal production. The Court declared the provisions setting wage rates unconstitutional. Although the Court found that the provisions setting prices were constitutional and could operate independently, it held the unconstitutional portion inseverable because the Court had no "authority . . . by construction, to convert the manifest purpose of Congress to regulate production by the mutual operation and interaction of fixed wages and fixed prices into a purpose to regulate the subject by the operation of the latter alone." 298 U.S. at 316. *See also Carey v. Population Servs. Int'l*, 431 U.S. 678, 708 n.2 (1977) (Powell, J., concurring in part) (although the statute prohibiting distribution of contraceptives to minors could be severed and applied to individuals other than parents and married minors, "the result 'would be to create a program quite different from the one the legislature actually adopted,'" quoting *Sloan v. Lemon*, 413 U.S. 825, 834 (1973)); *Sloan, supra* (the Court declared inseverable the unconstitutional provision of aid to sectarian schools since the provision of aid only to nonsectarian schools was not the legislature's intent); *Spraigue v. Thompson*, 118 U.S. 90, 94-95 (1886) (Georgia statute requiring vessels to hire pilots that contained an unconstitutional exception for boats travelling intrastate or to South Carolina or Florida could not be severed to eliminate the exception, since the statute would be "made to enact what confessedly the legislature never meant" and "confers upon the statute a positive operation beyond the legislative intent, and beyond what every one can say it would have enacted in view of the illegality of the exceptions").

[4] In *Jones & Laughlin*, severability was not an issue as the Court was faced with two possible interpretations of a statute and adopted the interpretation that enabled it to sustain the entire statute. Here, part of Section 43 is admittedly unconstitutional and the only question is *how much* of the particular section must be removed.

[Continued]

appeals sought "to save as much of the statute as [it] can," DOL Br. at 19 (citing *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)),[5] respondents suggest that adherence to separation of powers principles requires saving as many words as possible in a statutory section. But a test designed merely to preserve words can create a power greater than Congress intended to convey and thereby destroy, not preserve, the congressional purpose. And since a court's responsibility is not mechanically to save words, but to preserve the congressional intent, the issue should not be whether the remaining phrases of Section 43 function without the excised portions but rather whether, absent the excised veto, Congress would have sought to achieve its purpose through other means.

In Section 43, where the invalid statutory provision is a procedural measure that reserves power to Congress to make substantive policy decisions later, a finding of inseverability has additional separation of powers implications because the court's actions will bestow more power on the executive branch than Congress intended. In determining severability, Section 43 must be distinguished from other statutes which set forth several legislative policies and the question for the court is simply whether, if Congress had known one of the policies would be declared invalid, it would have made the remaining policy choices. *See, e.g., El Paso & N.E. Ry v. Gutierrez*, 215 U.S. 87 (1909) (cited in DOL Br. at 17, 19). Here, Con-

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[4] [Continued]

In *Tilton*, the Court still analyzed the history of the challenged law and found the section was not essential to the statute as a whole.

[5] The plurality opinion in *Regan* notes a severability presumption that was never endorsed by a majority of the Court. *See* Pet. Br. at 25 n.29. Most importantly, all the Justices who found the provision unconstitutional examined the legislative history to determine if Congress would have been satisfied with what remained after severance.

gress reserved the power to make fundamental policy choices concerning the scope and design of the EPP, *e.g.*, benefit levels, scope of hiring duty, interrelationships between benefits and hiring preferences, after reviewing the agency's proposals. The scheme of shared legislative—executive responsibility for the EPP's development uniquely created in Section 43(f) may offend the principle of separation of powers. However, by invalidating the procedural provision that reserves the ultimate power to Congress but sustaining the responsibilities delegated to DOL, the court shifts legislative power to the executive, thus depriving Congress of the authority that it had intended to reserve to itself. *See Chadha*, 462 U.S. at 1014 (Rehnquist, J., dissenting) (quoting *Spraigue v. Thompson*, 118 U.S. 90, 95 (1886)); Pet. Br. at 24 n.27.

B. The Severability Test Established By The Court Of Appeals Requires Judicial Reconstruction Of Remaining Statutory Provisions.

Respondents do not dispute that the court of appeals changed the *Champlin* test by asking only whether "Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision." 766 F.2d at 1565 (28a). Respondents endeavor to reconcile this test with *Champlin*, contending that "[t]he court of appeals asked precisely the right question. The district court had only two choices when it found the legislative veto portion of the EPP invalid: save the duty-to-hire provisions or strike the duty-to-hire provisions." DOL Br. at 19. But these two choices are not the only options that would have been available to Congress and therefore are not the only considerations relevant in determining whether "the legislature would have been satisfied with what remained." *Champlin*, 286 U.S. at 235. Respondents ignore the possibility that although Congress wanted to provide some insurance against employee dislocation, the invalidated provision was such an integral part of Section 43(f) that Congress

would not have passed that subsection in the form it did without substituting language limiting DOL's unbridled discretion to determine the dimensions of the EPP.

Respondents claim that "petitioners' approach would force the courts into speculation about legislation Congress did not enact." DOL Br. at 20. While the determination of legislative intent may involve inferences, those inferences are well-grounded in the established tools of statutory construction. In determining congressional intent, there is no easy substitute for a critical analysis of the existing evidence. Where the evidence suggests that Congress would not have been satisfied with the remaining provisions of the statutory section, the invalid provisions should not be severed, and Congress should be left to exercise its authority to enact another statutory provision to achieve the original legislative purpose.

Respondents' alternative is to ignore the specific indicia of legislative intent and allow courts to reconstruct the remaining provisions of a partially invalid statute whenever the court believes the statute serves an "important purpose." Respondents argue that this approach leaves to Congress the task "of revising the EPP, should it choose to, in light of the demise of the legislative veto." DOL Br. at 19. While respondents' approach is superficially appealing since it avoids a detailed inquiry into congressional intent and maintains some of the legislation originally enacted, its danger is that it involves the courts in redefining rights and responsibilities of private parties and making policy judgments in areas where Congress has not made the final judgments.[6]

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[6] Respondents' approach may reflect the view that Congress is busy and may not reenact a constitutionally valid provision. But if the issue remains important, as respondents maintain, Congress will act. *Compare EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), *with* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (Congress reenacted the Reorganization Act without the legislative veto provision immediately after the court found that the legislative veto could not be severed).

The judicious course is to remember that "[t]he legislature always has the constitutional power to re-enact the valid provisions of a law which was nullified on grounds of inseparability." Note, *Separability and Severability Clauses*, 51 Harv. L. Rev. 76, 115 (1937). Under separation of powers principles, congressional reenactment is clearly preferable to a court's striking only part of an integrated and specific delegation of regulatory authority and allowing that court-amended authorization to operate in a manner Congress never intended. *See Davis v. Wallace*, 257 U.S. 478 (1922).[7]

Respondents sidestep the separation of powers problem inherent in their position by overstating petitioners' position. Petitioners do not contend that "if a court finds anything in the otherwise valid balance of a statute that it guesses Congress might have written differently . . . the Court must strike the whole enactment . . . ." DOL Br. at 20. Petitioners' position is simply that a court cannot ignore evidence that, if Congress had known that the legislative veto provision was invalid, it would have preferred to enact an employee protection program different from what can be reconstructed from the remaining provisions of Section 43(f). In the instant case, Congress certainly had before it alternative approaches to employee protection in both the House and Senate bills as they were submitted to Conference.[8] Applying the proper test, a court reasonably could infer that if the House or Senate had known that it would not have

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[7] "Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and *no other authority* is competent to give them a larger application."

257 U.S. at 484-85 (emphasis added).

[8] *See infra* at 14.

ultimate veto power over DOL's design of the program under Section 43(f), it would have defined the program more precisely.[9]

This case demonstrates in practical terms the consequences of replacing a meaningful analysis of legislative intent with mechanical formulas designed to preserve anything that can operate independently. Respondents repeatedly concede that Section 43's mandatory financial benefit guidelines have never been promulgated, DOL Br. at 22, 23 n.11, and 43, and further concede that the duty-to-hire regulations were promulgated some five years after the statutory deadline, and after this Court invalidated the legislative veto in *Chadha*. DOL Br. at 7. Respondents' severance test thus sustains regulations which belatedly establish an expansive discretionary regulatory program, completely detached from the financial benefits Congress required, and which impose on a minority of the air carriers a duty to hire "protected employees" whose job loss had nothing to do with deregulation and who now may be employed by another carrier.[10] The exercise of regulatory authority that respondents' severability test would preserve is thus radically different

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[9] Respondents simply do not address the numerous unresolved issues in the duty-to-hire provision that Congress left for subsequent resolution by administrative action subject to congressional review. *See* Pet. Br. at 37. And, of course, Congress intended that the duty-to-hire and financial benefit provisions would operate as an integrated program. *See infra* at 16-17.

[10] 48 Fed. Reg. 52,854, 52,862 (1983). DOL's regulations also override air carrier safety-related statutory hiring obligations and most affirmative action requirements. Many of these issues are being addressed in a case pending before the United States Court of Appeals for the D.C. Circuit. *Alaska Airlines, Inc. v. Brock*, 632 F. Supp. 178 (D.D.C. 1986), *appeals docketed*, Nos. 86-5042 and 86-5085 (D.C. Cir. Jan. 27 and Feb. 13, 1986). They are relevant here, however, to the extent they illustrate that preserving the remaining provisions of Section 43(f) without the veto can operate in ways Congress did not intend.

from the authority Congress intended to confer upon DOL.

II. RESPONDENTS DO NOT REFUTE EVIDENCE THAT CONGRESS WOULD NOT HAVE ENACTED THE REMAINING PROVISIONS OF SECTION 43 IN THE FORM IT DID WITHOUT THE VETO PROVISION.

In most statutes which include a legislative veto, it is apparent that: (1) the remaining provisions are operative without the invalid provision, and (2) the power delegated without the veto restriction is greater than Congress intended. Adopting the first truism, the court below would hold all legislative vetoes presumptively severable. Adopting the second truism, the U.S. Court of Appeals for the Fourth Circuit would conclude that since a legislative veto "restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

While the circuits differ, under this Court's precedent, neither approach can be substituted for a careful examination of the language, structure, and history of the statutory provision to determine whether the legislative veto is such an integral part of the specific authorization that Congress would not have delegated the authority without the veto. Yet respondents contend that evidence that Congress would not have enacted the remaining language in Section 43 is not relevant to whether "Congress . . . would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision." 766 F.2d at 1564 (26a). Thus, respondents reject important evidence demonstrating Congress' specific intent to defer certain policy issues and instead to reserve power to exercise final control over the ultimate design of the EPP.

A. Under Its Severability Standard, The Court Of Appeals Rejected Evidence That Congress Would Not Have Enacted The Remaining Provisions Of Section 43 Without A Legislative Veto.

Petitioners and respondents agree that the starting point for severability analysis is the language and structure of the statute itself, which "must ordinarily be regarded as conclusive." DOL Br. at 21, Pet. Br. at 28 (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Petitioners and the district court thus thought it highly relevant that in the "long and comprehensive" Deregulation Act, 594 F. Supp. at 95 (34a), which addresses over 25 regulatory delegations, there is only one legislative veto provision, and that provision is incorporated in, and exclusively applies to, the single subsection that delegates authority to DOL, a department not otherwise engaged in airline deregulation.[11] That veto is an integral part of detailed restrictions on DOL's regulatory power, including a six month deadline, a thirty day review period before certain congressional committees, and a sixty "legislative" day review period before each house of Congress. As the district court found, "[t]hese elaborate procedures are, in fact, apparently unique among the 200 statutory legislative veto provisions enacted by Congress in the extent to which they ensure congressional control over the regulatory process." 594 F. Supp. at 95 (34a-35a). Yet under its novel standard, the appellate court brushed aside this evidence of the language and structure of Section 43 because it "does not speak to whether Congress would have preferred no employee protection plan at all." 766 F.2d. at 1563 (25a). *See also* DOL Br. at 27.

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[11] It is also significant that at the same time it strengthened the legislative oversight in Section 43, the Conference Committee eliminated a legislative veto in the automatic entry program, one of the most controversial provisions in the Deregulation Act. *See* Pet. Br. at 42.

Respondents further disregard evidence that without the veto check, Congress may well have preferred another form of employee protection, DOL Br. at 16, when in fact, such evidence would be highly relevant to whether Congress would have been satisfied with the remaining provisions of Section 43. Contrary to respondents' contentions, the House-passed bill represented a traditional form of employee protection that was commonly applied in the transportation industry. Indeed, the House provision explicitly referenced employee protection provisions in two railroad acts. H.R. 12611, 95th Cong., 2d Sess. § 32 (1978) (citing the programs in the Interstate Commerce Act, 49 U.S.C. § 11347 (1982) and the Rail Passenger Service Act, 45 U.S.C. § 565 (1982)). Congress was familiar with this form of labor protection and the incorporation of a legislative veto, therefore, would hardly have appeared necessary. The Senate-passed bill, on the other hand, contained stringent threshold requirements for both the financial portion and the duty-to-hire provisions of the EPP. S. 2493, 95th Cong., 2d Sess. § 22 (1978). Either the House or Senate bill would have provided DOL more guidance than the bill which emerged from Conference.

Respondents recognize that the Conference bill was a compromise between two entirely different employee protection approaches, but fail to mention that the Conference bill was in many respects broader than the legislation passed by either house. First, the Conference Committee cut in half the threshold qualification requirements for financial benefits and, secondly, it apparently removed these requirements entirely from the duty-to-hire provisions, leaving no guidance as to how Congress intended to relate the duty-to-hire obligations to employees dislocated by deregulation. The Conference Committee simultaneously retained the one-house veto provision and strengthened its legislative oversight by adding the thirty day committee review requirement. H.R. Conf. Rep. No.

1779, 95th Cong., 2d Sess. 106 (1978). Thus, after Conference, the EPP authority was significantly different —in some respects broader in scope and in other respects less detailed—than the authorities contained in either the Senate or House bills.[12] *Id.* at 104-06. Congress left certain key policy issues unresolved. It could do so with confidence, however, because it had strengthened its hand in the development and approval of whatever program the Secretary of Labor might propose.

Despite the substantial evidence that without the veto provision, Congress would have defined more precisely the parameters of employee protection or chosen a more traditional approach, the court below simply dismissed this evidence because in its view the question is not whether Congress would have enacted the "exact statute," but rather whether Congress would have preferred this statute after severance, "to no statute[] at all." 766 F.2d at 1560 (18a).

B. The Legislative Veto Was An Integral Part Of The Restricted Authority Delegated To DOL Under Section 43(f).

By applying the wrong severability standard, the court below disregarded the evidence that Congress would not have passed Section 43 without a legislative veto. *See id.* at 1563 (25a). If such evidence had been properly considered, the court would have concluded, as did the district court, that when a legislative veto provision is so "mutually connected with and dependent on [other

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[12] As the district court noted, "the Conference Committee report indicates that the legislative veto provision, taken from the Senate bill, was significantly strengthened before passage by the addition of the requirement that final regulations be submitted to Congress thirty days before they are issued." 594 F. Supp. at 95 (35a-36a) (citations omitted). DOL concedes that "this 'report and wait' provision by its terms gives Congress no substantive authority," DOL Op. Br. at 8, but the veto provided the essential leverage that makes all the additional oversight procedures in Section 43(f) meaningful.

provisions of the section] . . . to warrant a belief that the legislature intended them as a whole, . . . all the provisions which are thus dependent, conditional or connected, must fall with them." *Warren v. Charlestown*, 2 Gray 84, 99 (Mass. 1854).

Respondents argue that Senator Zorinsky's proposed amendment, which sought to eliminate the financial benefits portion of the EPP and retain only the duty to hire, shows that Congress considered the veto to be important only as it related to the more controversial financial assistance component. Brief for Respondent Air Line Pilots Association at 31-32. Significantly, however, the Zorinsky bill retained the legislative veto as a check on the duty-to-hire program. Moreover, the Senate rejection of the Zorinsky bill further demonstrates that Congress wanted an integrated program with both financial benefits and a duty to hire.[13] Congress specifically rejected

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[13] Respondents refuse to recognize that although Congress *could* have specified that Section 43(f)'s legislative veto provision applied only to regulations regarding a portion of the EPP, it chose not to separate the EPP into individual parts. Rather, it envisioned "[t]he interaction of these provisions," S. Rep. No. 631, 95th Cong., 2d Sess. 116 (1978) ("Senate Report"), resulting in a unified program of employee protection in which the duty-to-hire and financial assistance provisions operated in tandem. *See* Pet. Br. at 40 n.49. Further evidence of the interaction of the financial assistance and duty-to-hire portions of the program is contained in the duty-to-hire provision itself, Section 43(d)(3), where Congress instructed the Secretary of Labor, "[i]n addition to making monthly assistance or reimbursement payments under this section," to "encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority." And the financial assistance provision in turn indicates Congress' intent that the two parts of the same section of the statute should operate together by mandating that an eligible protected employee's monthly assistance payment shall depend upon whether that "eligible protected employee is offered reasonably comparable employment." Section 43(b)(2).

the approach ultimately taken by DOL of limiting the EPP to the duty to hire.[14]

Respondents further argue that because Congress did not explain in detail *why* the legislative veto was important, a court cannot draw the inference that Congress considered the legislative veto to be an integral constraint on DOL's authority. But the test of severability does not depend on the amount of time Congress devoted to discussing a particular provision. A legislative provision that Congress finds vitally important is not necessarily the subject of extensive debates. Congress normally only devotes extensive time to measures that are controversial or whose purposes are not clear. Here, Congress clearly understood the purpose of the legislative veto (to retain ultimate control over the design of the EPP), and its inclusion in the EPP was never controversial.

In addition, respondents contend that the EPP adopted by the Conference was not particularly unique but is "similar to ones that had been approved 'in certain cases in the past,'" DOL Br. at 26 (quoting S. Rep. No. 631, 95th Cong., 2d Sess. 113 (1978)). Respondents do not dispute, however, that the EPP's in other statutes had dealt with specific companies, workers, route terminations, and employment dislocations that were a direct result of some private transaction or government approval. In Section 43, Congress was proposing for the

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[14] Given DOL's decision to jettison the financial benefits portion, it is ironic that it highlights the statement in the Senate Report that "[b]ecause it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform. . . ." DOL Br. at 30 (quoting Senate Report at 114). DOL's regulatory program imposes the full cost of employee dislocation only on certain covered air carriers. Moreover, if DOL had adopted the financial benefit regulations required by Section 43(f), it would have recognized the need to restrict the hiring duty to employees affected by deregulation in order to limit the hiring pool and hold down costs to the federal government, as Congress intended. *See* Senate Report at 116.

first time an unemployment insurance plan coupled with a system of generous employee re-hire rights that addressed not just "individual firms or individual employees, but rather, the general regulatory structure [encompassing] all of the areas and all the workers in the industry." *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 709 (1977) (statement of Robert E. Ginther, Committee staff member). *See also* Pet. Br. at 33-34. Given the unique nature of the EPP, the inference is strong that Congress included the legislative veto to reserve ultimate control over the program's design.

Finally, respondents' contention that "employee protection was a central concern" of the legislators, DOL Br. at 29, is belied by the actions of Congress both during consideration of, and subsequent to, enactment. First, most airline deregulation legislation did not include employee protection because most legislators recognized that deregulation would create jobs, and that additional insurance was probably unnecessary because of the government's preexisting authority to condition approval of air carrier transactions on the inclusion of labor protection provisions.[15] In addition, respondents have not explained why, despite its purported importance, Congress has failed to appropriate any funds for the EPP, or why DOL has not proposed the financial guidelines mandated by Congress which respondents claim were the most significant and far-reaching aspect of that program.

There is no small irony in the Secretary of Labor's contention that Congress was primarily concerned with exercising a veto over the financial benefits portion of Section 43. Respondents essentially argue that although the EPP was very important to Congress, primarily because of the financial assistance provisions, and that the

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[15] *See* Pet. Br. at 34-36.

legislative veto was a check on this aspect of the EPP, this Court can ignore the importance of the veto because Congress has not appropriated funds and DOL has not issued the mandatory financial assistance regulations. Such an argument is internally inconsistent, and should not serve as a pretext for disregarding the importance of the veto as the ultimate congressional check on both aspects of one integrated program. Respondents' claim that some sort of employee protection was so important to Congress that it would prefer anything, even a program that operates contrary to congressional intent, to nothing at all, must be rejected.

CONCLUSION

Without the legislative veto, Congress would not have been satisfied with the remaining provisions of Section 43. This Court should therefore find the veto provision inseverable from the remainder of that statutory section and reverse the decision of the court of appeals.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.
Counsel of Record
DONALD T. BLISS
JOHN H. BEISNER
REBECCA K. TROTH
JAMES P. NEHF
O'MELVENY & MYERS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 457-5325

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